

No. 05-20-01048-CV

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In the Court of Appeals for the  
Fifth District of Texas at Dallas

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GAEDEKE HOLDINGS II, LTD.

Appellant/Cross-Appellee,

v.

CHAIT & HENDERSON, P.C. D/B/A UPTOWN VISION

Appellee/Cross-Appellant.

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**BRIEF OF BUILDING OWNERS AND MANAGERS  
ASSOCIATION GREATER DALLAS  
AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT**

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Respectfully Submitted,

/s/ Anthony J. Barbieri

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## **Publications**

Investopedia, Jul 7, 2021, “Gross Lease”.  
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 A&M Univ. Tex. Real Estate Research Ctr., March 3, 2020. Retrieved from  
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 Univ. Real Estate Research Center, Jan. 2001. Retrieved from  
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## INTEREST OF AMICUS

*Amicus Curiae* Building Owners and Managers Association (“BOMA”) Greater Dallas is a professional advocacy and service organization representing members of the commercial real estate industry, in particular owners, managers, and related service providers and professionals, and is the Dallas, Texas BOMA Affiliate Association. BOMA Greater Dallas’s members include commercial landlords who are parties to triple net, base year, and other kinds of leases and who rely upon a shared understanding of contract terminology commonly used across the commercial leasing industry by landlords, tenants, brokers, property managers, and real estate counsel.

To reach its decision, the Trial Court was required to apply the terms of a lease agreement which identified itself as a “triple net” lease and which provided for payment of a fixed monthly rental amount plus a percentage pro-rata share of the landlord’s operating expenses. While Appellant’s argument about the effect of the Trial Court’s interpretation is correct – the Trial Court implicitly found the lease agreement to be a “base year” lease – of greater concern to *Amicus Curiae* is that to reach this outcome the Trial Court must have improperly construed unambiguous language in the lease agreement identifying it as a “triple net” lease structure. This approach is likely to have

an adverse impact on the interests of *Amicus Curiae*'s members as well as all commercial landlords, tenants, brokers, and agents who all rely on the shared understanding of such terminology commonly used in lease agreements, particularly if ratified by this Court.

## **ARGUMENT AND AUTHORITIES**

### **A. Net, Gross, and Modified Leases.**

Most commercial office leases take one of a few common and well-established forms that differ in how the tenant's share of the landlord's operating expenses is calculated. Two common forms of commercial lease that differ in this respect are "net" and "gross" leases.

A "net" office lease is one in which the tenant pays the tenant's full proportional share of the landlord's operating expenses for the building in which the tenant leases space, with the lessor passing through responsibility for its building operating expenses. *See e.g., Fazio v. Cypress/GR Houston I, LP*, 403 S.W.3d 390, 427 (Tex. App.—Houston [1st Dist.] 2013, pet. denied) (describing triple net lease). In a "triple net" lease, the tenant pays its proportionate share of the property taxes, insurance, and common area maintenance expenses for the building. *Id.* These expenses are commonly referred to in the commercial leasing industry by a variety of terms, including

“nets,” “NNN,” “basic costs,” “common area maintenance” and “CAM,” among others. *See generally, id.* Whatever terms are used, the defining feature of a net lease – the thing that makes it a net lease instead of some other kind of lease – is that the tenant pays its proportionate share of the landlord’s operating expenses in addition to a fixed monthly rental amount.

In contrast, under a “gross” lease the tenant only pays a fixed monthly rental amount – usually higher than that in a net lease structure – and the landlord pays all property expenses. “Gross Lease”, Investopedia, Jul. 7, 2021<sup>1</sup>; Sicola, M, “Commercial Real Estate Terms and Definitions”, p.13, NAIOP Research Foundation, Mar. 2017<sup>2</sup>.

A “base year” lease is a type of modified gross lease where the tenant pays a fixed monthly rental amount – usually higher than that in a triple net lease and lower than that in a pure gross lease<sup>3</sup> – plus only its proportional

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<sup>1</sup> Available at: [https:// www.investopedia.com/ terms/ g/ gross-lease.asp](https://www.investopedia.com/terms/g/gross-lease.asp)

<sup>2</sup> Available at: [https:// www.naiop.org/ Research%20and%20Publications/ Reports/ Terms%20and%20Def initions](https://www.naiop.org/Research%20and%20Publications/Reports/Terms%20and%20Definitions).

<sup>3</sup> Because the tenant’s contribution toward operating expenses is lower under a base year lease than under a triple net lease, a base year tenant typically pays a higher amount in fixed base rent over the life of the lease in comparison to a triple net tenant renting comparable space. In contrast, since a tenant makes no contribution toward operating expenses under a gross lease and a partial contribution toward operating expenses under a base year lease, the fixed monthly rent in a gross lease is usually higher than that under a base year lease.

share of *marginal* operating expenses *above* operating expenses in the “base year” of the lease (typically, the first year of the lease term). *See, e.g., Group Hosp. Servs., Inc. v. One & Two Brookriver Ctr*, 704 S.W.2d 886, 888 (Tex. App.—Dallas 1986, no writ) (describing base year lease). Instead of paying its proportionate share of the landlord’s total operating expenses each year (as under a triple net lease) or no operating expenses each year (as under a pure gross lease), the tenant under a base year lease pays only its proportionate share of the difference between operating expenses in the current year and operating expenses in the lease’s “base year,” usually with a higher fixed monthly rent than a triple net lease. Once again, this aspect of rental structure is what defines a “base year” lease and differentiates it from other kinds of leases, including triple net leases.

**B. A Lease Must Be Construed According to the Intent of the Parties and Language Must be Given Effect.**

A lease agreement is treated like any other contract under Texas law in that it is subject to the rules of construction to determine the mutual intent of the parties expressed in the lease. *See, e.g., Italian Cowboy Ptrs., Ltd. v. Prudential Ins. Co. of Am.*, 341 S.W.3d 323, 333 (Tex. 1991) (applying principles of standard contract construction to lease agreement). A contract is unambiguous if it can be given a definite or certain legal meaning.



*Columbia Gas Transmission Corp. v. New Ulm Gas, Ltd.*, 940 S.W.2d 587, 589 (Tex. 1996). In construing a contract, the Court must give effect to the parties' intentions *as expressed in the document*. *J.M. Davidson, Inc. v. Webster*, 128 S.W.3d 223, 229 (Tex. 2003) (emphasis added). A contract is properly construed "from a utilitarian standpoint bearing in mind the particular business activity sought to be served." *Reilly v. Rangers Mgmt., Inc.*, 727 S.W.2d 527, 530 (Tex. 1987).

**C. The Ubiquitous Usage of Lease Structure Terms Has Generated a Plain Meaning Expressing the Intent of Landlords and Tenants**

Commonly arising transactions frequently have their own attendant shorthand through common business usage. For instance, though not expressly defined in most agreements, seeing invoice payment terms of "net 30" would indicate parties intended payments to be due 30 days from the date of invoice and would be delinquent thereafter. *E.g., Summit Global Contractors, Inc. v. Enbridge Energy, L.P.*, 594 S.W.3d 693, 696 (Tex. App.—Houston [14<sup>th</sup> Dist.] 2019, no pet.) (explaining "net 30" shorthand). If a contract specifies a service will be "available 24/7/365" during the contract term, it is understood that there will be no periods during which the service will be unavailable (i.e., that it will be available 24 hours of every day, seven

days per week, and 365 days per year). *See, e.g., Watanabe v. Summit Path Partners, LLC*, \_\_\_ S.W.3d \_\_\_, 2021 WL 3501542 at \*4 (Tex. App.—Houston [1<sup>st</sup> Dist.] Aug. 10, 2021, no pet. h.) (24/7/365 availability of premises). If a construction contract provides for pricing “on a time and materials basis”, then the parties would reasonably understand that one party will pay for the supplies and labor at an hourly rate to complete work under the agreement. *See, e.g., Horizon Shipbuilding, Inc. v. BLYN II Holding, LLC*, 324 S.W.3d 840, 844-45 (Tex. App.—Houston [14<sup>th</sup> Dist.] 2010, no pet.) (time and materials contract). In each of these cases, the language used may not have an apparent “plain meaning” from the literal text, but through common usage has acquired a general understanding by the business community at large. When used in contractual language, these shorthand terms set forth the intent of the parties.

In the leasing context, certain terms operate the same way. The terms “triple net”, “gross” and “base year” have specific meanings commonly understood across the commercial leasing industry, and refer to important differences in how a tenant’s rent is calculated. *See generally, e.g., Chen, J.,*

“Triple Net Lease (NNN)”, Investopedia, Jul. 1, 2021<sup>4</sup> (defining a triple net lease); “Space City Retail Leasing Activity Drops 7 Percent”, *NewsTalk Texas*, Texas A&M Univ. Tex. Real Estate Research Ctr., Mar. 3, 2020<sup>5</sup> (distinguishing average rental rates by triple net basis); Hunt, H. et al., “Austin City Limits”, *Commercial Markets*, Texas A&M Univ. Tex. Real Estate Research Center, Jan 2001<sup>6</sup> (distinguishing average rental rates in Austin office market on gross lease pricing basis); Sicola, M, “Commercial Real Estate Terms and Definitions”, p.17, NAIOP Research Foundation, Mar. 2017 (summary of common lease types by distinguishing features).

These terms are commonly used in commercial leases, and indeed by courts interpreting such leases, because they succinctly embody and express the parties’ shared understanding about an important feature of the lease affecting calculation of the tenant’s rent. *E.g.*, *Willis v. BPMT, LLC*, 471 S.W.3d 27, 29 (Tex. App.—Houston [1<sup>st</sup> Dist.] 2015, no pet.) (discussing triple net rental structure). When used in a commercial lease, such terms may be among the most important words used in a commercial lease since they

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<sup>4</sup> Available at: [https:// www.investopedia.com/terms/ t/ triple-net-lease-nnn.asp](https://www.investopedia.com/terms/t/triple-net-lease-nnn.asp).

<sup>5</sup> Available at: <https://www.recenter.tamu.edu/news/newstalk-texas/?Item=23977>.

<sup>6</sup> Available at: <https://assets.recenter.tamu.edu/documents/articles/1438.pdf>.

represent the parties' core intent regarding the intended structure of financial rights and obligations under the lease. Accordingly, it does a disservice to all parties to a commercial lease agreement for terms like "triple net," or contract terms which set up a rental structure whereby the tenant is to pay its pro-rata share of operating expenses in addition to a fixed monthly rental amount, to be disregarded in lease language since the ubiquitous usage of such terms in the leasing context is used precisely to define the financial structure of the lease.

**D. Recognizing Common Lease Terminology Usage Is Critical to Proper Lease Construction.**

The lease at issue in the instant case is expressly denominated as a "Triple Net Office Lease Agreement." (Appellant's Appx. 32). The annual base rent amount is denominated on a "NNN" basis. (*Id.*). The ubiquitous use of this language in the commercial leasing context together with its use in the lease agreement is significant, indicating that the parties intended for the lease to follow the general triple net structure whereby the landlord agreed to accept, and tenant agreed to pay, compensation for the leased space comprised of both a fixed monthly rental amount plus payment of its proportionate share of the building's property taxes, insurance, and common area maintenance costs (the "triple net").

Though *Amicus Curiae* does not take a position on the dispute between Appellant and Appellees, *Amicus Curiae* finds alarming Appellee’s argument, based upon the testimony of its counsel, that the use of the term “triple net” in a lease is “not important”. (See Appellee’s Brief, pp. 10-11). To the contrary, the commonly shared understanding of the term “triple net” itself makes it a key term indicating intent of the parties as to the lease structure. See *Coker v. Coker*, 650 S.W.2d 391, 393-94 (Tex. 1983) (courts should examine and consider the entire writing in an effort to give effect to all the provisions of the agreement so that none will be rendered meaningless and if it can be given a definite or certain meaning then it is not ambiguous and will be construed as a matter of law).

*Amicus Curiae* respectfully requests that the Court not adopt Appellee’s argument as the opinion of the Court. Texas contract law long rests on the principle that the mutual intent of the parties is to be given deference. The goal of contract construction is to ascertain the mutual intent of the parties. *J.M. Davidson, Inc. v. Webster*, 128 S.W.3d 223, 229 (Tex. 2003). Courts will equitably reform agreements to correct for mutual mistake of the parties so that the agreement will accurately reflect the parties’ intent. See *Estes v. Republic Nat’l Bank of Dallas*, 462 S.W.2d 273, 275 (Tex. 1970) (discussing

mutual mistake). Effort must be made to harmonize all provisions of an agreement must be given effect and none rendered meaningless. *Universal C.I.T. Credit Corp. v. Daniel*, 243 S.W.2d 154, 158 (Tex. 1951).

This Court should not adopt the position that the “triple net” and “NNN” terminology used by the parties in the lease agreement at issue in this case is “not important” or irrelevant to proper interpretation of the lease’s rental structure. The commercial reality is that the ubiquitous usage of specialized lease terminology renders use of those terms indicators of the parties’ broad intent as to their respective rights and obligations under the lease.

Countless leases use the same shorthand to express the parties’ agreement, and this shared understanding of usage is vital to the efficient operation of the commercial leasing markets. If the Court were to adopt the rationale and argument of the Appellee that the parties’ repeated use of the terms “triple net” and “NNN” is “not important” and can be entirely disregarded when interpreting this lease, it would essentially be creating a “leasing exception” to the construction rule which requires a court to attempt to give effect to all provisions. Such an outcome would be particularly inappropriate here, where there is no conflict between the shorthand “triple

net” and “NNN” terms used in the parties lease and the rental structure as defined in the lease’s operative provisions, including the key definitions of “Rent” and “Basic Costs.”

By Appellee’s logic, use of such terminology is “not important” which implies it is not indicative of the intent of the parties. Yet common and ubiquitous usage proves otherwise: a “triple net” lease, “net-30” payment terms and “time and materials” pricing have all become part of a shared business lexicon precisely because there is a shared understanding of their respective meanings. Use of that shared business lexicon indicates the parties using such terminology intended for it to have the understood meanings. If adopted by this Court, the holding Appellee urges would run counter to the very touchstone of contract law: giving effect to the intent of the parties.

Because Appellee urges the Court to adopt an analytical framework which is neither supported by existing law nor required to adjudicate the parties’ dispute, and such a precedent would potentially alter the currently existing rights of commercial tenants and landlords in the State of Texas, *Amicus Curiae* respectfully request that the Court decline to do so in its decision in this case. *Amicus curiae* express no view on any other issue raised on this appeal.

Respectfully Submitted,

*/s/ Anthony J. Barbieri*

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### **Certificate of Compliance**

Pursuant to Texas Rule of Appellate Procedure 9.4, I certify that this Brief contains 2336 words.

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### **Texas Rule of Appellate Procedure 11 Disclosure**

Pursuant to Texas Rule of Appellate Procedure 11, I certify that my fees for preparing this brief were paid by BOMA Greater Dallas.

/s/ Anthony J. Barbieri

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### **Certificate of Service**

I certify that a copy of the foregoing brief was served on counsel for all parties by electronic service on September 22, 2021.

/s/ Anthony J. Barbieri

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